(2)

No. 08-1465

In the Supreme Court of the United States

CARLOS J. RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces (CAAF) correctly held that the 60-day period within which an accused may file a petition for review in the CAAF under Article 67(b) of the Uniform Code of Military Justice, 10 U.S.C. 867(b), is jurisdictional.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 10

TABLE OF AUTHORITIES

Cases:

Bowles v. *Russell*, 551 U.S. 205 (2007) 4, 5, 6
Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 9
Clinton v. *Goldsmith*, 526 U.S. 529 (1999) 6
Crandon v. *United States*, 494 U.S. 152 (1990) 8
Dean v. *United States*, 129 S. Ct. 1849 (2009) 7
Middendorf v. *Henry*, 425 U.S. 25 (1976) 8
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 10
Ruiz-Martinez v. *Mukasey*, 516 F.3d 102 (2d Cir. 2008) 6
United States v. *Griffin*, 524 F.3d 71 (1st Cir. 2008) 6, 7
United States v. *Kozminski*, 487 U.S. 931 (1988) 8
United States v. *Larneard*, 3 M.J. 76 (C.M.A. 1977) 8
United States v. *Rodriguez*,
No. 9900997, 2002 WL 31433595 (N-M.C.C.A. Oct. 25, 2002) 2
No. 9900997, 2007 WL 2059801 (N-M.C.C.A. July. 17, 2007) 2

Cases—Continued: Page

United States v. *Urutyan*, 564 F.3d 679 (4th Cir. 2009) 6
Wisniewski v. *United States*, 353 U.S. 901 (1957) 9

Constitution, statutes and rules:

U.S. Const. Art. I 6
Military Justice Amendments of 1981, Pub. L. No. 97-81, § 5, 95 Stat. 1088 9
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:
Art. 67, 10 U.S.C. 867 ..... 2, 4, 6
Art. 67(b), 10 U.S.C. 867(b) ..... *passim*
Art. 125, 10 U.S.C. 925 2
Art. 134, 10 U.S.C. 934 2
8 U.S.C. 1252(b)(1) 6
18 U.S.C. 3582(c) 6
28 U.S.C. 2107(c) 5
Fed. R. App. P.:
Rule 4(a)(1)(A) 5
Rule 4(b) 6
Fed. R. Crim. P. 35(a) 6, 7

Miscellaneous:

H.R. Rep. No. 306, 97th Cong., 1st Sess. (1981) 9
S. Rep. No. 146, 97th Cong., 1st Sess. (1981) 9

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-40a) is reported at 67 M.J. 110. The orders of the Navy-Marine Corps Court of Criminal Appeals are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2009. A petition for reconsideration was denied on March 4, 2009 (Pet. App. 41a-42a). The petition for a writ of certiorari was filed on May 27, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a Gunnery Sergeant in the United States Marine Corps, was convicted by general court-martial of

two specifications each of forcible sodomy and indecent acts, in violation of Articles 125 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 925 and 934. He was sentenced to 25 years of imprisonment, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed. The Navy-Marine Corps Court of Criminal Appeals (N-MCCA) set aside one specification each of sodomy and indecent acts and authorized retrial on those specifications; it affirmed the remaining findings. No. 9900997, 2002 WL 31433595, at *1 (Oct. 25, 2002). On retrial, petitioner was again convicted of the two remaining specifications and sentenced for all four offenses to 50 years of imprisonment, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. The convening authority reduced the prison term to 20 years but otherwise approved the sentence. The N-MCCA affirmed. No. 9900997, 2007 WL 2059801, at *1 (July 17, 2007). The Court of Appeals for the Armed Forces (CAAF) granted petitioner's petition for review, but then vacated that order and dismissed the petition for lack of jurisdiction. Pet. App. 1a-40a.

1. UCMJ Article 67, 10 U.S.C. 867, authorizes the CAAF to review decisions from service criminal courts of appeals subject to certain conditions and limitations. Article 67(b) provides, in pertinent part:

> The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—
>
> (1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

> (2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused * * * at the latest address listed for the accused in his official service record.

10 U.S.C. 867(b).

2. a. Petitioner, the father of five children, repeatedly molested two of his daughters—ages 11 and 15 at that time. In April 1998, the victims confided in each other, and the older daughter told a neighbor about the abuse. The neighbor called the military police, which began an investigation that led to petitioner's arrest, prosecution, and convictions by general court-martial. Gov't CAAF Br. 4-5.

b. On July 17, 2007, the N-MCCA issued its second decision, affirming petitioner's convictions and sentence after retrial. That same day, a copy of the N-MCCA's decision was served on petitioner's military appellate defense counsel. On July 24, 2007, another copy of the decision was sent via certified mail to petitioner's last address of record. On September 28, 2007, appellate defense counsel filed a "Motion to Submit Petition for Grant of Review Out of Time" in the CAAF. Counsel stated that the petition was 13 days late because petitioner did not contact the Navy-Marine Corps Appellate Defense Division to express his desire to appeal his case to the CAAF until September 27, 2007. Pet. App. 3a-4a; Gov't CAAF Br. 4.

The government opposed the motion on the ground that petitioner did not show "good cause" for his late petition under CAAF Rule of Practice and Procedure 33.

On November 16, 2007, the CAAF granted petitioner's motion to file his petition out of time. After supplemental briefing, the CAAF specified two issues for review, including the question whether the CAAF possesses jurisdiction to hear an accused's untimely petition for review. Pet. App. 4a.

c. The CAAF ultimately vacated the grant of review and dismissed the petition for lack of jurisdiction. Pet. App. 15a. The CAAF acknowledged that it had previously held that the filing deadline in UCMJ Article 67 was nonjurisdictional and that it had considered untimely petitions in some cases. *Id.* at 4a-6a. But the CAAF stated that this Court in *Bowles* v. *Russell*, 551 U.S. 205 (2007) --holding that a statutory appeal deadline, unlike a rule-based claims processing deadline, was jurisdictional—"changed the analytical landscape" for "evaluating the jurisdictional significance of filing deadlines in appellate practice." Pet. App. 7a. The CAAF recognized that post-*Bowles*, the federal courts of appeals had also distinguished between a statutory appeal deadline, which is jurisdictional, and a rule appeal deadline, which is not. *Id.* at 8a-10a.

Applying *Bowles*, the CAAF held that the statutory 60-day filing deadline in Article 67(b) is jurisdictional. The CAAF stated that "[u]nder the plain language of the statute," a petition for review "must be filed within the sixty-day statutory time limit." Pet. App. 11a. The court rejected petitioner's argument that the provision's use of the term "may" rendered the deadline permissive rather than mandatory. It explained that the term "may" merely permits an accused to file a petition for review if he chose to do so, but the petition nevertheless had to be filed within the 60-day period. *Id.* at 11a-12a. The CAAF also relied on Article 67(b)'s legislative his-

tory, noting that although Congress has amended Article 67(b) to enlarge the filing period from 30 days to 60 days, its motivation was to promote finality. *Id.* at 12a-14a.

Judge Effron dissented on the ground that *Bowles* involved a statute that restricts appellate review, whereas in his view Article 67(b) mandates CAAF review. He noted that the CAAF had previously held that Article 67(b) was not jurisdictional and that the legislative history of Article 67(b) supported that view. Pet. App. 15a-26a.

Judge Baker dissented on grounds that *Bowles* did not address a military statute; that Congress' use of the term "may" in Article 67(b) meant that the statute was not mandatory; and that the unique nature of the military justice system required the conclusion that Article 67(b) is not jurisdictional. Pet. App. 26a-40a.

ARGUMENT

Petitioner contends (Pet. 2-14) that the CAAF erred in holding that Article 67(b)'s 60-day deadline for filing a petition for review is jurisdictional and therefore precludes it from considering an untimely petition. The CAAF correctly applied *Bowles* v. *Russell*, 551 U.S. 205 (2007), to Article 67(b), and its decision does not conflict with any decision of this Court or of any federal court of appeals. Further review is unwarranted.

1. The CAAF's holding that the statutory filing deadline in Article 67(b) is jurisdictional is consistent with this Court's decision in *Bowles* and its application by the federal courts of appeals. In *Bowles*, the Court held that the time limits prescribed in Fed. R. App. P. 4(a)(1)(A) and 28 U.S.C. 2107(c) are jurisdictional and that the court of appeals thus lacked authority to con-

sider an appeal filed outside of those time limits—notwithstanding the district court's explicit entry of an order permitting an untimely appeal in that case. The Court explained that "statutory time limits for taking an appeal [are] jurisdictional." *Bowles*, 551 U.S. at 210. The Court reasoned that because Congress decides which cases the federal courts have jurisdiction to consider, Congress can "determine when, and under what conditions, federal courts can hear them." *Id.* at 213. The Court distinguished statutory deadlines from rule-based deadlines, which it deemed to be nonjurisdictional claim-processing rules. *Ibid.*

Post-*Bowles*, the courts of appeals uniformly have held that the violation of a statutory deadline for taking an appeal is a jurisdictional defect, whereas the violation of a rule-based deadline is not. Compare, *e.g.*, *United States* v. *Griffin*, 524 F.3d 71, 82-84 (1st Cir. 2008) (seven-day window for correcting a sentence in Fed. R. Crim. P. 35(a), as referenced and incorporated in 18 U.S.C. 3582(c), is jurisdictional); and *Ruiz-Martinez* v. *Mukasey*, 516 F.3d 102, 118-119 (2d Cir. 2008) (30-day deadline in 8 U.S.C. 1252(b)(1) for filing petition for review from final removal order is jurisdictional), with *e.g.*, *United States* v. *Urutyan*, 564 F.3d 679, 684-686 (4th Cir. 2009) (non-statutory deadline in Fed. R. App. 4(b) for seeking appeal in criminal case is not jurisdictional).

2. Consistent with those cases, *Bowles* requires the conclusion that the statutory deadline within which an accused may appeal under Article 67(b) is jurisdictional, as the CAAF correctly held. The jurisdiction of military appellate courts, as Article I courts, is strictly limited to the bases of jurisdiction expressly conferred upon them by statute. See *Clinton* v. *Goldsmith*, 526 U.S. 529, 533-534 (1999). In Article 67, Congress conferred jurisdic-

tion on the CAAF to review the record in certain cases reviewed by a service court of criminal appeals, pursuant to specified terms and conditions. As relevant here, Article 67(b) states that "[t]he accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of" receiving actual or constructive notice. 10 U.S.C. 867(b). That text explicitly requires a military defendant who desires CAAF review to file a petition within a certain time (*i.e.*, 60 days from the notice date), and thereby bars a defendant from seeking CAAF review after 60 days.

Petitioner argues (Pet. 9-10) that Article 67(b) provides an option for the accused to appeal, but does not establish a compulsory deadline for the court, because it states that an accused "may" petition the CAAF, whereas the statute in *Bowles* used the term "shall." As used in Article 67(b), however, the term "may" means that an accused is permitted to petition the CAAF for review of his adverse court of criminal appeals decision, but he is not required to do so. But if he elects to petition, the phrase "within 60 days" makes clear that he must do so within the specified time limit. That interpretation finds support in the uniform holdings of courts of appeals that the statutorily based deadline in Fed. R. Crim. P. 35(a)—stating "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error"—is jurisdictional despite its use of the term "may." See, *e.g.*, *Griffin*, 524 F.3d at 83 n.14 (collecting cases).[1]

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[1] Petitioner's reliance (Pet. 9-10) on the rule of lenity is misplaced, for at least two reasons. First, Article 67(b)'s imposition of a mandatory filing deadline is not ambiguous, let alone grievously ambiguous. See *Dean* v. *United States*, 129 S. Ct. 1849, 1856 (2009). Second, Article

Petitioner also argues (Pet. 11-12) that *Bowles* does not apply at all because the nature of the military criminal justice system requires a different rule from the civilian legal system. But the question whether the 60-day filing deadline in Article 67(b) is jurisdictional presents a narrow question of appellate practice that does not implicate the military's need for order and discipline or its ability to provide for the common defense. In any event, even if military exigencies could override Congress's prescription of a filing deadline, the CAAF is the best positioned court to determine whether the unique demands of the military justice system require a contrary result, and it concluded otherwise below. See *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976) (noting "great deference" to CAAF judgments in areas of the law "peculiar to the military branches").[2]

Nor does the legislative history of Article 67(b) support petitioner's view. In *United States* v. *Larneard*, 3 M.J. 76 (C.M.A. 1977), the Court of Military Appeals (the predecessor to the CAAF) held that Article 67(b)'s clock began running only from actual notice of the service court of criminal appeals' decision to the defendant; constructive notice was insufficient. Responding to the

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67(b)'s filing deadline does not define a crime or impose punishment, and thus does not implicate the rule's concern of providing fair warning of the boundaries of criminal conduct and limiting selective or arbitrary enforcement. See, *e.g.*, *Crandon* v. *United States*, 494 U.S. 152, 158 (1990); *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988).

[2] Petitioner argues (Pet. 7-8) that it can be difficult for military appellate defense counsel to communicate with appellants because of the routine turnover of military appellate defense counsel and the dispersal of military appellants all over the world. Petitioner's concerns are overstated given the communication technologies widely employed by the military to disseminate information to military personnel.

Defense Department's concern that the actual-notice requirement had resulted in unwarranted delays in the execution of sentences, Congress amended Article 67(b) by providing that the filing period runs from the earlier of actual or constructive notice to the accused. See Military Justice Amendments of 1981 (1981 Amendments), Pub. L. No. 97-81, § 5, 95 Stat. 1088.[3] The relevant Committee reports reveal Congress's intent to promote finality and to have the right to petition the CAAF "expire" or "lapse" after the statutory time period following notice to the accused. H.R. Rep. No. 306, 97th Cong., 1st Sess. 8 (1981); S. Rep. No. 146, 97th Cong., 1st Sess. 35 (1981); see Pet. App. 12a-14a. Those passages support the CAAF's jurisdictional interpretation of Article 67(b).

Petitioner suggests (Pet. 10), based on the lack of an explicit statement by Congress to the contrary (either in the 1981 amendments or thereafter), that Congress must have agreed with the CAAF's previous interpretation of Article 67(b)'s filing deadline as nonjurisdictional.[4] But this Court has repeatedly cast doubt on such claims of congressional ratification by acquiescence. See, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) ("It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpreta-

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[3] At the same time, Congress extended the filing period from 30 days to the current 60 days. See 1981 Amendments § 5, 95 Stat. 1088-1089.

[4] Although the CAAF had previously viewed Article 67(b) as nonjurisdictional (Pet. App. 4a-6a), the CAAF was entitled to reconsider and overrule its prior view based on this Court's guidance in *Bowles*. To the extent any tension remains, it is for the CAAF, not this Court, to harmonize its own decisions. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

tion.") (internal quotation marks omitted; brackets in original) (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)). In any event, the text of Article 67(b), which is the surest guide to congressional intent, supports the CAAF's view in light of *Bowles* that the 60-day deadline is jurisdictional. See p. 7, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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